UNAPPROVED AND SUBJECT TO CHANGE
CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION
MINUTES OF THE MEETING, Public Session

January 15, 2002

Call to order: Chairman Karen Getman called the monthly meeting of the Fair Political Practices Commission (FPPC) to order at 9:10 a.m., at 428 J Street, Eighth Floor, Sacramento, California. In addition to Chairman Getman, Commissioners Sheridan Downey, Thomas Knox, and Gordana Swanson were present.

Chairman Getman noted that two comment letters had been received during the evening of January 14, 2002, and that copies were being made available. She noted that the Commissioners did not have time to read either letter.

Item #1. Approval of the Minutes of the December 7, 2001 Commission Meeting.

The minutes of the December 7, 2001 Commission meeting were distributed to the Commission and made available to the public.

Commissioner Knox moved that the minutes be approved.

Commissioner Swanson seconded the motion.

There being no objection, the motion carried.

Item #2. Public Comment.

Caren Daniels-Meade, from the Political Reform Division of the Secretary of State's office, reported that 801 filings were received by the filing deadline of January 10, 2002.

Item #3. Proposition 34 Regulations: Advertising Disclosure - Proposed Emergency Amendment to Regulation 18402 and Adoption of Emergency Regulations 18450.3 - 18450.5

Commission Counsel Scott Tocher presented the emergency regulation, explaining that an emergency regulation was necessary because of the unclear advertising disclosure statutes that must be complied with for the March 2002 primary. He noted that, because they are emergency regulations, the Commission would be able to reexamine their decisions after the primary, when they will consider a permanent regulation.

Mr. Tocher summarized the primary issues as: (1) How to name the ballot measure committee; (2) Defining "economic or other special interests" of committees and large donors; (3) Deciding

whether a committee must use specific language to identify large donors in the advertisements; and (4) Issues surrounding the amendment of the advertisements and the statement of organization, and the time allowed to do so. He noted that the definitions of "advertisement" and "cumulative contributions" were not being presented because the proposed emergency scheme does not need to rely on those definitions.

Mr. Tocher explained that Decision 1 asked the Commission whether committee name requirements should be applicable to all committees or only primarily formed ballot measure committees. The language in proposed regulation 18402 and 18450.3 option A, incorporated the limiting language the Commission favored for § 84504, narrowing the scope to primarily formed ballot measure committees. He noted that staff had received letters of support on this proposal.

There was no objection from the Commission to limiting the name requirements to primarily formed ballot measure committees.

Mr. Tocher explained that Decision 2 included the bracketed words "and identification" and that staff believed that those words in Decisions 2 and 3 could be eliminated.

There was no objection from the Commission.

In response to a question, General Counsel Luisa Menchaca stated that the proposed regulation 18402(c) language "as required" would make it clear that affirmative actions, such as changing the name and amending the statement of organization, must be done.

Commissioner Downey stated that the language may be redundant, and suggested that the sentence end on line nine, after the word "committee."

There was no objection to Commissioner Downey's suggestion.

Mr. Tocher explained that Decision 3 proposed reiteration of language in the statute, and is included to make the regulation complete.

There was no objection to accepting the language of Decision 3.

In response to a question, Ms. Menchaca stated that there was no reference to § 84504(c) because it related to the actual disclosure itself and is dealt with in another regulation.

Mr. Tocher added that it was in regulation 18450.3, dealing with the identification in the advertisement.

Mr. Tocher explained that staff presented two options for the Commission's consideration dealing with § 84504 in decision 4. Option A presented a more specific option, requiring that a committee explicitly identify a contributor's product, commodity or service that is specifically concerned with the ballot measure concern. The language on lines 15 and 16 was intended to require that the committee identification be related to the particular ballot measure, but was optional. Option B was more general in nature. The statute states, "economic or special

interests," and the approach of option B would allow the name requirement to embody a shared goal or interest.

Chairman Getman stated that she had reviewed 1988 ballot measure committee names, and compared the names of those committees to what they would have been under the two options proposed. She asked whether the "Committee Against Unfair Taxes" could have been required to be named the, "Committee Against Decreased Tobacco Sales" under either option under consideration. She stated that the statute seems to want the real money support for the ballot initiative to be reflected in the committee name.

Lance Olson, with Olson, Hagel, Waters and Fishburn, responded that the name suggested by the Chairman would not be appropriate under either of the two options proposed. A more appropriate name under option B, which he supported, could be, "Committee Against Unfair Tobacco Taxes." He pointed out that the sponsorship rules would had required that the Tobacco Companies be identified as sponsors.

Mr. Tocher stated that option A would probably require that the word "Tobacco" be included in the name, but that option B, subdivision 2, would require the name to reflect a shared economic interest, a goal, or a purpose.

Mr. Olson suggested that language could be added indicating that if there is no economic interest, then a goal or purpose should be used. He noted that the language of the statute indicates that the name can be the economic or other special interest.

In response to a question, Mr. Tocher stated that the statute's use of the word "or" does not preclude the Commission from allowing a special interest to be used in the name only when an economic interest does not exist.

Ms. Menchaca added that the statute could be interpreted as requiring that an economic interest be used when one exists, and that the Commission could set that priority.

Chairman Getman noted that the 1998 ballot initiative committee, "Californians For Yes On Proposition 1A," would have been named, "Citizens for Prop 1A - A Broad Coalition of Teacher, Educational, Building Industry and Realtor Associations Including Republicans, Native Americans, Edison Energy and WalMart Shareholder John Walton," under option A. However, under option B, she was concerned that the name could have been, "A Coalition in Support of School Bonds," without mentioning the economic interests. She noted that it did not include the "major funding by" language.

Mr. Olson agreed that, under option B, the name would reference a shared interest in the initiative. He noted that the disclosure required, under option A, is fundamentally unconstitutional. Most people who give $50,000 are likely to be the sponsors of the committee pursuant to regulation 18419.

Steve Lucas pointed out that some contributors donate to campaigns because of a special interest and not because of their economic interest.

Chairman Getman stated her concern that the two options represented two extremes, and that Mr. Olson's alternate proposal would not disclose serious economic interests.

Mr. Olson agreed, but noted that there are other safeguards in existing statutes that will bring the economic interests out, including the sponsorship requirements and the requirement that the top two financial donors are identified in the name. He stated that a literal reading of the statute would create an absurd result and would lead to the statute being declared unconstitutional. His proposal would save the statute from that sort of challenge. It would identify the shared interest of the major donors. If they have different interests, his proposal would require that they identify the different interests.

Commissioner Downey stated that the statute requires that the name clearly identify the economic or other special interest, but questioned whether that meant that the special interest would be identified in the name only if there was no economic interest. He did not agree that § 84504 might provide a loophole which would disguise the economic interest.

Mr. Olson responded that the statute could be read in a manner which would allow either an economic interest or a special interest to be identified in the name.

Commissioner Knox noted that the committee name would then be a subjective determination of the contributor, and that the statute does not allow the Commission to impose an objective standard on the names.

Mr. Olson responded that it would be dangerous to put objective criteria on an inherently subjective decision. Option A would inappropriately attempt to identify the motivation of the contributors.

Commissioner Knox stated that the statute refers to the interests, and not the intent, of the contributors. The economic interests are objectively ascertainable. He noted that it is easy to identify economic interests. When contributors have more than one interest and there is an economic interest that is ascertainable, regardless of the contributors stated motivation, the statute supports identification of that economic interest.

Mr. Olson questioned whether that would mean that contributors with several different economic interests would have to identify each of their economic interests in the name, and questioned who would decide which economic interest would be used.

Chairman Getman questioned what name would be used for a Proposition 9 committee named, "Californians Against Utility Taxes," funded by Public Media Center, The Foundation For Taxpayer and Consumer Rights, Utility Reform Network, and Bonnie Raitt. She suggested that the Commission consider requiring identification of an ascertainable economic interest, and if none exists, then the special interest be identified.

Mr. Olson noted that the proposal is an emergency regulation. He offered to present to staff, immediately after the March election, all of the print and media ads from the various committees

he and Mr. Lucas represent, to be used to measure how the regulation worked. He believed that option B provided the guidance that was needed.

Chairman Getman questioned the harm of trying option C, if options A and B were two extremes that would not work.

In response to a question, Mr. Tocher stated that, if there was no economic interest, and the contributor was an individual, a special interest could be identified. If the contributor was a business entity, the economic interest of the industry would be identified.

Chairman Getman questioned why an individual's occupation or business would have to be identified according to staff's recommendation.

In response to a question, Mr. Tocher stated that using shareholder information in the name would identify the source of the wealth of the contributor, and gives the public some information about the individual as required by the statute. He noted that if a contributor is allowed to decide what their interest is, it may be of no benefit to the public.

Chairman Getman pointed out that it could be equally misleading if someone's economic interest is identified when it has nothing to do with the motivation for the contribution.

Commissioner Downey noted that the language of subdivision (1) deals with that issue.

Commissioner Knox stated that the language requires identification of the economic interest that will be affected by enactment or defeat of the ballot initiative. Option B was too terse, too brief, too subjective and too uninformative, while option A was too long and too cumbersome. He suggested that the language "specifically concerned with the ballot measure" be changed to, "that is likely to be affected by enactment of the ballot measure." This would allow a more objective standard.

Mr. Tocher pointed out that the individual contributor poses the greatest difficulty in identifying the interest. He stated that identification of a common goal or purpose of business entities would not be sufficient. He suggested that, if the Commission adopts a more narrow approach, problems could then be identified after the March primary and reconsidered before adopting a permanent regulation.

In response to a question, Ms. Menchaca stated that, under option A, persons who shared an economic interest or special interest would have to be listed separately. She added that staff was concerned that the public needed to know that there are various statutes that affect the name identification. She suggested that Decision 4, option B, line 14 be changed to read, "Identification of a disclosable contributor's "economic or other special interest" pursuant to Government Code section 84504 shall identify any ascertainable economic interest or other special interest that is likely to be affected by the ballot measure." She suggested that subdivision (c) be inserted following that sentence. This would provide the greatest flexibility for enforcement and would allow evaluation after the March election. She was concerned that, if

the Commission adopted option B, and ballot measure committees were well behaved during the March election, it might make it difficult for staff to propose a more specific standard.

In response to a question, Ms. Menchaca stated that staff could add to her proposal tacit language, "if no economic interest exists."

In response to a question, Mr. Olson stated that option C would encompass both a business entity and an individual. He pointed out that business entities sometimes have no economic interest in the outcome of a ballot measure, but contribute to a committee because they believe in the ballot measure.

Chairman Getman stated that the language "likely to be affected by the ballot measure" should be tied to both the economic interest and the special interest.

In response to a question, Mr. Tocher stated that, if the emergency regulation does not work, the Commission is not bound in any way to keep it. They may change the regulation before the emergency regulation expires.

Chairman Getman pointed out that the decision the Commission makes will be used for the March primary because they will not meet again until after the primary.

Jim Knox, from California Common Cause, encouraged the Commission to identify an economic interest when it is available. He strongly opposed option B because the language allowing committees to identify themselves based on another goal or purpose is much too broad and would create a huge loophole.

Mr. Knox urged the Commission to discourage the addition of the names of entities who do not meet the threshhold requirements that would dilute the identity of the true source of funds.

Chairman Getman noted that some nonprofit groups sponsor measures, doing much of the administrative work to promote the measure. They may not meet the threshold monetary requirements but would still want their name included.

Mr. Knox responded that they should not be named in the advertisements, because the intent of the statute was to identify who is paying for the advertisements. He noted that the sponsoring group would be identified in the ballot arguments.

Commissioner Knox questioned the statutory authority for not allowing groups to be included in the name.

Mr. Knox responded that the Commission should set a contribution threshold to avoid those situations. He noted that it is a campaign tactic that has been and will continue to be used.

Ms. Menchaca pointed out that § 84505 is a general provision that prohibits coordination to try to get around the statutes.

Chairman Getman stated that sponsors should not be precluded from being included in the name. She noted that only one name is allowed, and that a separate name for disclosure purposes is not allowed under the statute.

Mr. Knox responded that the public sees the name only in the advertisement.

Commissioner Swanson observed that the name of a sponsoring group influences voters.

Mr. Knox responded that sponsor's names appear in newspaper articles and ballot arguments, and that they do not need to be included in the advertising disclosure.

Chairman Getman stated that the advertising disclosure statutes did not change the name requirements, but added to them. She suggested that the Legislature could change that, but sponsors, economic interests and special interests must be disclosed in the name at this time.

Jim Sutton, President of the California Political Attorneys Association (CPAA), supported the Commission's efforts to clarify the statute. He offered help from members of the CPAA when the Commission revisits the issue after the March election, and urged to Commission to work quickly after the March election in order to be ready for the November election.

Trudy Schafer, representing the League of Women Voters of California, agreed with Jim Knox that option B was too vague and would be a disservice to the public if adopted. If the Commission adopts option B, everyone will be very careful during the March election. She urged the Commission to adopt an emergency regulation that would allow for better evaluation of what was or was not too restrictive.

Mr. Olson stated that he and Mr. Lucas would support option C as articulated by Ms. Menchaca.

Ms. Menchaca revised the proposed language to read:

> "Identification of a disclosable contributor's "economic or other special interest" pursuant to Government Code section 84504 shall identify any ascertainable economic interest that exists that is likely to be affected by the ballot measure. If no ascertainable economic interest exists, the contributor shall identify any other special interest that is likely to be affected by the ballot measure. In the event that there is more than one disclosable contributor and all such disclosable contributors do not share an economic interest or special interest the name shall identify the various economic or special interests."

Mr. Olson suggested that the words, "special interest" be substituted with, "goals or purposes" because it is not as vague. In response to a question, he clarified that it would refer to the goals and purposes of a contributor in making the contribution, and not the goals or purposes of a given organization.

Mr. Tocher stated that the addition of the language "that is likely to affected by…" helps to identify the interest.

Mr. Olson pointed out that, if "special interest" is used, disclosure could be avoided entirely because the contributor may not have an economic interest or a special interest, and gave $50,000 to the campaign because someone asked them to.

Chairman Getman stated that she was much more comfortable with the new option C, and directed staff to retype the regulation and bring it back to the Commission for consideration after the lunch break.

Steve Lucas, with Nielsen Merksamer and on behalf of the committees supporting Propositions 41 and 42, supported the Commission's approach. He suggested that every time the words "economic interest" are used in the draft, they should be tied to the words, "that is likely to be affected by the ballot measure."

Commissioner Knox preferred option C, but was not convinced that it eliminated the excessive language in a name.

Mr. Tocher suggested that staff provide examples of conforming names when they present the proposed language for option C to the Commission. He noted that, under any version other than the old law, there may be difficult names.

Commissioner Swanson reminded staff that campaigns had already begun for the March election, and questioned how effective the discussion could be with regard to that election.

Mr. Tocher explained that decision 5 concerns regulation 18450.4, regulating the content of disclosure statements in advertisements. He asked that the Commission consider when, in addition to the name, the advertisement must disclose the two largest contributors of $50,000 or more. Staff asked the Commission to consider whether a "marker" phrase should be included, identifying why the contributors are being disclosed in the advertisement. Mr. Tocher presented options 1 and 2, which provided versions of that approach, and option 3, which simply required that the contributors be disclosed without any marker phrase. Staff recommended the language of option 1 because it provided the committees with options for that language.

In response to a question, Mr. Tocher stated that the Commission decided to require the name of contributors of $50,000 or more in an earlier decision. He explained that proposed regulation 18450.4(a) did not require that all contributors of $50,000 or more be named because it referenced § 84503.

In response to a question, Chairman Getman stated that the Commission imported the tentative $50,000 threshold into regulation 18450.4 because all of the sections were so interrelated.

Commissioner Knox requested that staff revisit that decision.

Commissioner Swanson noted that contribution amounts may fluctuate, so that the contribution is less than $50,000 before the printing of the advertisement, but more than $50,000 after the advertisement is printed, and asked staff to address that issue.

Mr. Tocher noted that Decision 6 addressed amending the disclosure statements.

Chairman Getman noted that the disclosures have to be accurate on the day that the advertisement is made. Subsequent changes must be made at the next available time, and the Commission will be deciding what that time should be. Additionally, the Commission will decide whether the disclosure should indicate "over $50,000" or the exact dollar amount of the contribution. Staff and comment letters received from the public encourage the "over $50,000" language in order to avoid having to make amendments every time the amount changes.

Chairman Getman noted that Mr. Olson's letter requested that staff include another example of appropriate language, reading "paid for by." She agreed that it would be appropriate.

Mr. Tocher agreed, and suggested that the language "or paid for by" be added to the expample language in option 1.

There was no objection from the Commission.

Jim Knox, from California Common Cause, encouraged the Commission to move towards option 1, but was concerned that the language "major support provided by" did not necessarily refer to monetary contributions, and that it should. He supported the language, "paid for by" and "major funding by." He believed that only one of the examples should be adopted in order to set a marker that identified monetary contributions. He did not believe that either of the proposals in option 2 would be satisfactory. The "exact amount" would be too difficult to track. The "$50,000 or more" language did not provide enough information because some donors contribute millions of dollars.

There was no objection from the Commission to the deletion of the language "major support provided by."

In response to a question, Chairman Getman stated that a committee would be prevented from including names of minor contributors by the statutory requirement that the advertisements cannot mislead the public.

Mr. Knox noted that it is important that the language be "major funding by" in order to avoid that result.

Ms. Schafer pointed out that there can be a distinction between the "funding by" and the emphasis of who is in control of the committee.

Mr. Tocher confirmed that the Commission preferred option 1, and that staff would bring language back after the lunch break for that option. Staff would also review the reason for establishing the $50,000 threshold for the regulation.

Mr. Tocher suggested that §§ 84503 and 84506 be added to the statutory reference in option 3.

Mr. Tocher noted that the language on line 20 of proposed regulation 18450.4 be changed to incorporate Mr. Olson's suggestion that the information be both written and spoken either at the beginning or at the end of the communication.

There was no objection from the Commission.

Mr. Tocher suggested that the language regulating the size of the print on written disclosures for television be changed to provide that the disclosure be "of sufficient size to be readily legible to an average viewer," pursuant to Mr. Olson's recommendation.

Mr. Olson noted that, alternately, the Commission could make clear that the 4% requirement could be applied to the entire disclosure statement, and not each line of the statement. That language was taken from the FCC regulations with respect to candidates.

Chairman Getman pointed out that the 4% may be too small if several written lines are involved.

There was no objection from the Commission to changing the proposed regulation to include the language "of sufficient size…" as proposed by Mr. Olson.

Mr. Olson suggested that line 22 of proposed regulation 18450.4 be changed to add the words "or less" after the words "thirty seconds," to acknowledge that there are commercials of less than 30 seconds.

There was no objection from the Commission.

Mr. Tocher proposed two additional changes to proposed regulation 18450.4, page 2, line 3. He suggested that the language be reworded to read, "The information shall be spoken in a clearly audible manner at the beginning or end of the communication and shall last at least three seconds."

There was no objection from the Commission.

Mr. Tocher explained that Mr. Olson also suggested that subdivision (3) of the proposed regulation be changed to delete the reference to the percentage of the height of the printed space of the advertisement, but maintain the requirement that the font size be in contrasting color to the background.

In response to a question, Ms. Menchaca stated that the change would be consistent in size and type with the mass mailing identification requirements.

Mr. Olson clarified that their 10-point type proposal was in respect to mailings and literature that is handed out. He had no objection to the 5% rule for other print media.

Mr. Tocher suggested that the language in Mr. Olson's letter, page 11, subdivisions 3, 4, 5, and 6 be incorporated in the proposed regulation, replacing proposed subdivisions 3, 4, and 5.

In response to a question, Chairman Getman stated that since newspaper advertisements would be distributed by hand or through the mail, they would be subject to the 10-point rule.

Mr. Olson stated that, if it would help to get the regulation adopted, they would concede that newspaper advertisements be excluded from the 10-point rule.

Chairman Getman suggested that 10-point type used in a standard letter would be sufficient in a newspaper advertisement.

Mr. Knox pointed out that the newspaper advertisement would be on a much bigger field than a standard letter.

Commissioner Swanson suggested that it could be formatted in bold.

Commissioners Knox and Downey supported the 10-point rule.

There was no objection from the Commission to using the 10-point rule.

There was no objection from the Commission to adding the "clearly audible manner" language to subdivision (2).

Mr. Tocher stated that Decision 6 involved the circumstances of amending the advertising disclosure. He explained that the proposed regulation provided that the amendment should be filed when the name of the committee changes or when the disclosable contributors of $50,000 or more change. Subdivision (b) provided a timeline for those amendments to occur. The timeline for broadcast advertisements requires an amendment within 7 days after a new person qualifies as a disclosable contributor or when the committee's name changes. Subdivisions (2) and (3) provide for disclosure on more tangible forms of advertisement, and require that amendments be filed whenever an order to reproduce the advertising item is placed. Mr. Tocher recommended that billboards be included in regulation 18450.5(b)(1).

Mr. Tocher stated that, instead of the seven calendar days recommended by staff, Mr. Olson recommended that disclosure under regulation 18450.5(b)(1) be within seven work days. Mr. Tocher suggested that 7 workdays would be too long, particularly during the late contribution period.

Mr. Lucas stated that it is most difficult to make that change on radio broadcasts because it is an audible disclaimer and must be recut in the studio each time a change is made. Once the change is made, it must be distributed throughout the state, presenting time-consuming logistical problems that are expensive. Mr. Lucas believed that seven working days would be more reasonable.

Mr. Lucas requested that the Commission provide some sort of "safe harbor" certainty, which would provide that, if a committee gets the new advertisement to the radio station within the seven days, they have satisfied their obligations under this law, even if the radio station does not get the advertisement on the air right away. He agreed with Mr. Olson's recommendation to add

the sentence, "A committee shall be deemed to have complied with this section if the amended advertisement is mailed to all affected broadcast stations by overnight mail no later than close of business on the seventh working day." He noted that radio stations treat the amended advertisements differently and would begin airing them at different times. Therefore, "safe-harbor" language would protect the committees if they get the amendments to the radio station in a timely manner.

Mr. Lucas pointed out that the disclosures are never going to be up-to-date to the minute, and that the Commission should consider the costs incurred by the committees every time a change is made, as well as the practicalities of getting the radio advertisements on the air.

Ms. Menchaca suggested that if the Commission were to add the sentence recommended by Mr. Olson, another sentence should be added stating that the amendment be mailed with a request that the radio station make the amendment.

Jim Knox observed that production costs of radio are very modest. He believed that response radio advertisements for both candidate and ballot measure campaigns often appear the day after a charge. Response radio advertisements do not take a week to get on the air. He agreed that getting the disclosure changed the next day may be too arduous, but that 7 calendar days was much too lax. If the Commission adopted 7 working days as the standard, he believed it would provide a "free ride" during the last nine days of the election. He asked whether a committee could submit a new advertisement the day after the name has changed, but use the old name for 6 days if the Commission chooses the 7-day time frame.

Mr. Tocher noted that regulation 18450.5 concerns amended advertisements only, and that new advertisements would fall under the standard disclosure rules. He explained that the amendment is required under § 84509.

Mr. Tocher explained that, if a committee name changes within the last 16 days before an election, the committee is already under an obligation to notify the filing officer of that change within 24 hours. Changes to radio advertisements would not require hiring a spokesperson since just the tag-line would need to be changed. He stated that staff recommended the 7-day period pursuant to an earlier Commission meeting.

Ms. Menchaca noted that, if the Commission chose to eliminate the $50,000 threshold, then the two largest donors would have to be identified, and that would probably require amendments more frequently.

Commissioner Swanson stated that under other circumstances, 7 working days might be reasonable, but that, during a campaign, speed is of great importance. She believed that 7 days was not acceptable, noting that at the end of a campaign, money pours into the campaign committees and that there must be a vehicle to let the public know where it came from. She agreed that the radio advertisements can be done within 48 hours. She believed that television advertisements could probably be amended even quicker. She suggested that the campaign committee should require that amendments to the advertisements be made within 4-6 hours when they sign the contract with the stations.

Mr. Lucas disagreed, noting that he did not think that type of agreement could be crafted. He agreed that there must be a request to place the amended advertisement on the air immediately, but noted that every station will respond to that request with a different time frame.

Chairman Getman agreed that a "safe-harbor" concept made sense, and should meet the committee's obligation. If the committee gets the advertisement out by overnight mail with a request that the amended advertisement immediately replace the advertisement that was being aired at that time, the committee should be considered to have met its legal obligations. The committee could get the amended advertisement out to the radio station in less than 7 days.

In response to a question, Chairman Getman stated that, when a Committee receives its largest contribution the committee knows right away that it is the largest contribution.

In response to a question, Mr. Olson stated that he had consulted with media consultants and that those consultants believed that 7 days was not enough time. Staff would need 1-3 days of studio time to redo the advertisement and then send the new advertisement to hundreds of locations all over the state. He noted that some advertisements are run in some areas and others in other areas and that there were logistical issues that needed to be dealt with in distributing the right advertisements to specific areas.

Mr. Olson noted that this is an emergency regulation. He stated that, in many cases, the advertisements are changed every two weeks anyway. He suggested that the Commission adopt 7 days and then reevaluate after the March election.

Commissioner Downey noted that the Commission did not want to place an impossible burden on the committees, but was very concerned about the amended advertisements during the crucial period right before an election.

Mr. Olson suggested that they track those advertisements aired at the end of the March campaigns and review how often they were changed during that time.

Chairman Getman suggested that changes could be made within 1-3 days, and that it should only take 1-2 days to get it in the mail. She suggested that the regulation be changed to 5 days.

Mr. Lucas stated that if the Commission changes it to 5 days, it should be 5 working days because changes made on a Tuesday, Wednesday or Thursday would be difficult to mail on a Sunday. He noted that the regulation would be in effect all of the time, including during holiday weekends.

Chairman Getman suggested 4 working days could be used.

Commissioner Knox preferred working with calendar days.

Chairman Getman noted that, during the end of a campaign, there are 7 working days in a week for the committees.

Mr. Lucas agreed, but noted that the logistics of getting 120 packages by DHL on a Sunday, or by FedEx on a Saturday, are very difficult. He pointed out that only 1/2 of the consultant staff work on the weekends.

Mr. Tocher pointed out that campaign staffs often know ahead of time when a large contribution is about to be made.

Chairman Getman noted that working on a Saturday would not be a large price to pay to get a $100,000 contribution.

Mr. Lucas pointed out that any new $50,000 contributor that has an economic or special interest will have to be included in the name, and that there are many contributors of $50,000 to statewide ballot measures. If that economic or special interest is not already included in the name it must be added, and he anticipated that it would happen often.

Mr. Tocher responded that when there are many $50,000 contributors, the public should know sooner than later about those contributors.

Mr. Lucas responded that it would mean 28 words on the screen instead of 27.

Commissioner Downey supported 7 calendar days with a "safe harbor" for committees. He did not want to put committees in violation of the regulation, but said that he would consider lowering the number of days after a trial period.

Commissioner Knox agreed.

Commissioner Swanson and Chairman Getman disagreed.

Mr. Tocher suggested that the Commission should consider which approach would yield the most useful information for review after the March election.

Chairman Getman stated that, if the committee makes the change and mails it within 5 calendar days by overnight mail it should work, and the committee would have the "safe harbor."

Commissioner Swanson agreed.

Commissioner Downey stated that he would support the 5 days.

Chairman Getman suggested that proposed regulation 18450.5(b)(1) be changed to require an amendment be sent within 5 calendar days, providing a "safe harbor" for committees that send the amendment within 5 calendar days by overnight mail, with a request that it immediately replace the previous ad.

Commissioner Swanson stated that a billboard amendment could not be made within the 5 days because of the number of billboards.

Ms. Menchaca stated that billboards could be included under subdivision (2).

Chairman Getman asked staff to research how long it would take to change billboards by the time that the Commission revisits the issue.

In response to a question, Mr. Tocher agreed that subdivision (3) should read "Tangible item advertisement disclosures…"

Chairman Getman asked staff to prepare new proposed regulations during the lunch break for the Commission's consideration.

The Commission adjourned for a short break at 11:45 a.m.

The Commission reconvened at 11:55 a.m.

Item #11. *In the Matter of Bill Leonard, The Assembly Republican Leadership Fund and Charles H. Bell, Jr.*, FPPC No. 99/444.

Commission Counsel Steve Meinrath gave a brief presentation of the facts of the case. Respondents failed to report $206,000 in late contributions during an election cycle, which was not in dispute. The Commission was being asked to impose a fine on the respondents, and staff encouraged the Commission to fine the respondents $12,000 instead of $6,000, as proposed by Administrative Law Judge Ann Elizabeth` Sarli.

Mr. Meinrath explained that the ALJ proposed imposition of the lower fine because the violations did not appear to be intentional. Staff believed that to be a mistake that would set a dangerous precedent. He pointed out that very few administrative cases involve intentional conduct, and that staff had already considered this when they chose to pursue the case administratively. He stated that staff evaluated the case by considering the streamlined enforcement policy of the Commission, noting that the policy did not control the case. The policy uses 15% of the unreported amount as a benchmark for the fine, which would amount to a little over $30,000 for this case. The maximum administrative penalties available for the case were $12,000. Staff considered the mitigating factors and balanced it against the seriousness of the offense when they recommended a $12,000 fine.

Mr. Meinrath explained that staff was concerned that future cases presented to an ALJ could result in fines being cut in half if the proposed ALJ decision in this case is adopted. If the conduct in this case had been intentional, staff would have pursued the case civilly or criminally.

Lance Olson, representing respondent Charles Bell, requested that the Commission adopt the ALJ decision. He explained that the ALJ rejected the argument charging the § 84203 violations. He suggested that the case points out the need for a policy for charging these types of cases. He noted that the Commission has a practice of settling these types of cases by combining counts so that late reports that should have been filed on the same day are charged as one violation. In this case, the late report was prepared and faxed to the recipients of the late contributions so that they

could report receipt of those contributions. However, the person in charge of the faxing failed to send the report to the Secretary of State's office. Mr. Olson noted that Form 497 contemplates that one report can be used to file multiple disclosures.

Mr. Olson pointed out that the ALJ cites six enforcement cases, three of which involved multiple contributions made on the same day that were charged as one violation. He believed that the streamlined policy should not be considered for any purpose on this case because the policy was meant to deal with those persons who were believed to have violated the PRA and wanted to enter into the streamlined procedure. In this case, the respondents did not agree to participate in the streamlined program. The ALJ used the criteria in regulation 18361(e)(4) to determine the fine. He did not agree that her sole reason for the amount of the fine was because the violations were not intentional. Mr. Olson discussed the criteria and the ALJ's use of the criteria, analyzing the reasons for the fine.

Mr. Olson urged the Commission to consider establishing an enforcement policy that would bring consistency to the enforcement process.

In response to a question, Mr. Olson stated that the streamlined policy should not be used as a benchmark for the fine calculation because regulation 18361 governs what should happen when a case goes before an ALJ. The streamlined policy does not govern those cases. He also noted that, at the time the violations occurred, the streamlined policy did not exist. He explained that, if the Commission used the streamlined policy as the criteria for evaluating cases, it could look like an "underground regulation."

Mr. Meinrath responded that Enforcement staff and the ALJ followed the regulation. Staff understood that the policy was not controlling in this case, but believed that it was relevant because the criteria of the regulation requires that the seriousness of the offense be considered. The policy was not an "underground regulation" but an expression of the Commission's feeling about appropriate penalties. Mr. Meinrath read from the ALJ decision, reiterating his concern that the reason for the lower fine was because the violations were unintentional.

In response to a question, Mr. Meinrath did not agree that the practice of the Enforcement Division is to combine violations.

Chairman Getman stated that the Commission has, for many years, charged one count per late contribution report. It is not a policy, and is not used in every case, but is a practice.

Mr. Meinrath responded that most cases involve either a single late contribution, or a committee charged with many violations. He noted that the ALJ determined that, when numerous violations were charged, the penalty cannot be apportioned to identify which part of it belongs to the late contribution reporting violations. He noted that this case involved numerous late reporting violations involving very large amounts of money. Mr. Meinrath found only a few comparable cases, and staff charged by the number of violations in those cases to achieve a just result. The ALJ found that charging by reporting period rather than by violation would strip the Act of its deterrent powers, and Mr. Meinrath agreed.

Chairman Getman pointed out that there are only two Commission policies with respect to enforcement cases of this type. The first policy involves the streamlined program. The second policy is formalized by regulation and considers factors when assessing an appropriate fine. A case that goes before an ALJ follows the second policy. The Commission will need to decide whether the ALJ proposal was appropriate by weighing the factors of the regulation.

Commissioner Knox stated that staff's concern was whether the calculations in the streamlined process presented an appropriate benchmark for determining the justice of the ALJ decision.

Mr. Meinrath agreed, and noted that staff's proposed $12,000 fine was much lower than the $30,000 fine that would be set by using the 15% benchmark established in the streamlined program.

Chairman Getman pointed out that whenever a case goes to an ALJ, each side takes a risk. There was no question that the ALJ followed the right factors in this case.

Commissioner Swanson noted that the two sides went to the ALJ was because no settlement could be reached.

Mr. Meinrath added that staff pursued an administrative fine because they believed that a $12,000 maximum fine was adequate in this case. They were concerned however, that the determination by the ALJ that no intentional conduct existed resulted in a 50% reduction in the penalty.

Chairman Getman noted that the ALJ considered six factors, and that she did not believe that it would result in a precedent.

Mr. Russo stated that, in practical fact, the Commission's decision on this case would present a strong statement to the Enforcement Division and to the regulated community regarding the value that should be placed on these types of cases. He believed that if the Commission accepts the ALJ decision, future respondents may not choose to participate in the late contribution report program if the Commission determines that the case is worth less than the fines that would be imposed under that program.

Chairman Getman did not agree, noting that the Commission could say that the expedited program is the best way to proceed, but that if the Enforcement Division or the respondents choose to go to an ALJ, they take a risk.

In response to a question, Mr. Meinrath stated that, once Enforcement Division decides to proceed administratively, the respondent has a right to an ALJ hearing if they choose to have one.

Item #12. *In the Matter of No on Knight - No on Prop. 22 and Cary Davidson,* FPPC No. 2000/354.

Commission Counsel Michelle Bigelow noted that this case is similar to the previous case. The Enforcement Division recommended that the Commission not adopt the proposed ALJ decision, and instead impose a higher fine.

Ms. Bigelow explained that the respondent is a recipient committee that received an electronic wire transfer of $20,000 during the late contribution period of the March 2000 primary. The contributor notified members of the committee that they were going to make the wire transfer. The contribution should have been reported on a late contribution report and was not. The contribution was not disclosed until five months after the election. Enforcement staff recommended a $2,000 fine at the hearing, and the ALJ found the respondents liable but imposed a $500 penalty instead. Ms. Bigelow did not believe that the proposed ALJ fine was in accordance with the respondent's conduct.

Ms. Bigelow pointed out that the Commission previously found that failure to report late contributions is one of the most egregious reporting violations in the Act. The streamlined policy did not directly consider the factors in regulation 18361, but it did focus on the seriousness of the violation as probably the most important in a late contribution report violation. A reliable indicator of the seriousness of these violations is the amount not reported and the Commission adopted a 15% policy accordingly. Ms. Bigelow noted that the policy imposes uniformity on similar violations and that a similar result would be 15% of the amount not reported. In this case that would amount to $3,000. The statutory maximum of $2,000 would be appropriate.

Cary Davidson, representing respondents No on Knight - No on Prop. 22 and Cary Davidson, argued that respondents decided not to proceed with the streamlined process and made their case before an ALJ because they believed that the regulations would allow the ALJ to impose a lower fine, which they believed to be appropriate. If the Commission chose to reject the ALJ decision, he requested that the Commission review the transcripts of the ALJ proceeding.

In response to a question, Mr. Davidson stated that they believed that the considerable testimony by himself, the Secretary of State's office, and Commission staff, which was presented at the hearing, would explain why the ALJ reached his conclusion. He believed that the Commission should be aware of all of those considerations presented at the ALJ hearing.

The Commission adjourned to closed session at 12:30 p.m.

The Commission reconvened at 2:03 p.m.

Items #11 and #12 (Cont.)

Chairman Getman announced that the Commission decided to adopt the proposed ALJ decisions in both cases by a vote of 3-1. Speaking for the majority, she stated that neither case will be treated as a precedential decision. The Enforcement Division charged and proceeded with both

cases correctly and the ALJ used the proper determinations in the regulation to assess the cases. The Commission decided not to disturb the ALJ's decision in either case.

Commissioner Swanson, as the minority vote, stated that she rejected both proposed ALJ decisions because of the undisputed fact that there was nonreporting of late contributions. Accurate reporting of contributions made late in the campaign is critical information to the public. In her opinion the seriousness of the violations far outweighs any mitigation of the conduct because it was negligent or inadvertent. She strongly supported Enforcement staff's position in both cases regarding the inadequacy of the fines as set forth in the proposed decisions.

Item #3. (Cont.) Proposition 34 Regulations: Advertising Disclosure - Proposed Emergency Amendment to Regulation 18402 and Adoption of Emergency Regulations 18450.3 - 18450.5

Staff presented and made available to the public revised proposed regulations 18402, 18450.3, 18450.4 and 18450.5

In response to a question, Mr. Tocher stated that staff advised the Commission that it could interpret § 84506 to allow a threshold of $50,000 because it was imported from § 84504.

Commissioner Downey stated that the language importing the $50,000 is that language in § 84506 reading, "… consistent with any disclosures required by §§ 84503 and 84504."

Ms. Menchaca stated that staff believed that language could mean two donors, reference to the name of the committee, or the $50,000. Staff thought that $50,000 was what it referred to. Staff found no legislative history to help interpret the statutes.

Mr. Tocher stated that one of the drafters of Proposition 208 may have indicated that the $50,000 limit was imported into § 84506.

Commissioner Downey stated that, for purposes of the emergency regulation, it was not important to revisit the issue. He suggested that the Commission may want to revisit the issue at a later time.

Chairman Getman suggested that it might be important to look at what the opposite interpretation would have done when the issue is revisited.

Mr. Tocher stated that the deletion of the language, "as required in the statement of organization" in proposed regulation 18402, line 9 could be problematic for Enforcement staff because they use that regulation to identify whether a committee name is accurate.

Ms. Menchaca stated that there are several places where the identification of a committee is required by law, and, without that language, a misleading name could be used.

Chairman Getman suggested that the language be put back in the regulation.

Mr. Tocher presented option C of proposed regulation 18450.3, which incorporated the suggestions made by the Commission earlier in the day.

Commissioner Downey suggested that the Commission adopt the language, "goal or purpose" in subdivision (1) of option C.

Commissioner Knox noted that the proposal provides that only when there is no economic interest can the special interest be identified. He did not believe that was consistent with the statute. The language of the statute should allow listing of both. He agreed that some altruistic purpose should not be listed when a manifest economic interest was at stake, but that he believed the statute allowed that both could be mentioned.

Chairman Getman stated that the statute provides that one or the other be used, but that the question was whether the Commission could establish a hierarchy.

Commissioner Knox did not agree that it was necessarily a hierarchy. He read the statute to mean "any" economic or special interest. The economic interest must be listed, but the language of the statute does not preclude someone from listing both interests.

Chairman Getman disagreed, noting that if both were allowed, all monied interests would come up with a special interest and it would dilute the impact of the economic disclosure.

Commissioner Knox agreed, but saw it as a flaw in the statute.

Commissioner Downey agreed that the economic interest must be disclosed and that another interest should not be disclosed when an economic interest was present.

Technical Assistance Division Chief Carla Wardlow suggested that the word "contributor" on line 5 of option C should be changed to "name."

After further discussion, the Commission decided to change the word "contibutor" to "the name or phrase pursuant to § 84504(a) shall identify".

Chairman Getman moved that the Commission adopt option C with the language "goal or purpose" instead of "special interest" on lines 6, 8, and 9, and with the words "name or phrase" instead of "name" on line 8.

Ms. Menchaca suggested that the word "other" be deleted from line 5.

There was no objection from the Chairman.

Commissioner Downey seconded the motion.

Commissioners Downey, Swanson, Knox and Chairman Getman voted "aye." The motion carried by a vote of 4-0.

Mr. Tocher noted that lines 11 and 14 would be changed to identify subdivisions (c) and (d) to comport with the rest of the regulation.

Ms. Menchaca suggested that, since regulation 18450.5 uses the term "close of business on the 5th day," and that it should be changed to, "no later than the fifth day," since the Commission chose to use calendar days.

Chairman Getman moved adoption of regulations 18402, 18450.3 (with option C and the changes noted), 18450.4 and 18450.5 (with the change noted) on an emergency basis. She also moved that the Commission adopt at the same time the statement of the finding of emergency.

Commissioner Downey seconded the motion.

Commissioners Downey, Swanson, Knox and Chairman Getman voted "aye." The motion carried by a vote of 4-0.

Item #8. Proposition 34 Regulations: Adoption of Regulation 18450.11, Paid Spokesperson Disclosure and Form 511, Paid Spokesperson Report.

Mr. Tocher explained that § 84511 requires that a special report be filed for paid spokesperson advertisements, and that a disclosure be made on the advertisement. Section 84511 was amended by SB 34 to provide that the committee, instead of the paid spokesperson, must now file the report. The trigger for the disclosure is now an expenditure instead of a payment or a promise of payment. The new law requires that the committee identify the measure, the amount that was expended, the date of the expenditure and the name of the recipient.

Mr. Tocher noted that the Commission previously decided that payments aggregating $5,000 count towards the expenditure. Proposed regulation 18450.11(a) reflects that decision. Section 82025 provides that an expenditure is made on the date a payment is made or on the date consideration, if any, is received. Decision 1 of the proposed regulation provided two options for defining the triggering mechanism: when the spokesperson's services are rendered, or when consideration is received.

Chairman Getman stated that the general rule provides that expenditures should be reported on the date payment is made or on the date the committee receives the goods or services.

In response to a question, Ms. Wardlow stated that the rule is in § 82025, under the definition of expenditure.

In response to a question, Mr. Tocher stated that the § 82025 directs that the triggering mechanism is the date that consideration, if any, is received. That consideration could be a mutual promise to provide a service. Option B would provide that it would be triggered by whichever came first.

In response to a question, Mr. Tocher stated that the Commission has advised, in other circumstances, that the expenditure is considered made when the goods or services are received. The Commission was being asked to define, "on the date consideration is received" as meaning either the date the spokesperson's services are rendered or the date there is a promise to perform services.

Commissioner Downey stated that consideration is given when mutual promises are exchanged.

After further discussion, Chairman Getman moved that the Commission adopt option b. In response to a question, she clarified that the consideration must be received by the spokesperson.

Commissioner Downey noted that if the trigger occurs on the date consideration is received by the spokesperson, it would be when the committee makes its expenditure, or when it makes an enforceable promise to make a payment. He suggested that the language of § 82025 be used.

In response to a question, Ms. Menchaca stated that staff was defining the trigger because those persons who are accustomed to reporting expenditures may not know that the definition was being applied literally.

After further discussion, Chairman Getman revised her motion to change the wording of proposed regulation 18450.11, lines 6, 7, 8, and 9 to read, "pursuant to this subdivision, the term expenditure shall have the meaning as set forth in Government Code Section 82025.

Commissioner Knox seconded the motion.

Commissioners Downey, Swanson, Knox and Chairman Getman voted "aye." The motion carried by a vote of 4-0.

Ms. Wardlow suggested that the cover page of Form 511 be changed, so that the second bullet on the left side of the page could be combined with the first bullet.

Mr. Tocher suggested that the language of the first bullet read, "Within 10 days of making or promising payments totaling $5,000 or more to the individual."

Chairman Getman moved that the Form be adopted with the deletion of the second bullet and with Mr. Tocher's suggested language change.

Commissioner Knox seconded the motion.

Commissioners Downey, Swanson, Knox and Chairman voted "aye." The motion carried by a vote of 4-0.

Item #4. Proposition 34 Regulations: Termination of Committees – Repeal of Emergency Regulation 18404.2 and Adoption of Regulation 18404.1

Chairman Getman noted that a comment letter had been received regarding this item but that the Commission had not had time to review it.

Commission Counsel Holly Armstrong explained that emergency regulation 18404.2 will expire on February 16, 2002. It deals with committees formed prior to January 1, 2001 and controlled by candidates who never held or no longer hold the office for which the committee was formed. The regulation requires that those committees be terminated no later than December 31, 2002.

Ms. Armstrong explained that subparagraph (a)(1) had been rewritten in the proposed regulation to address the Commission's concern that the phrase "elective state office" in regulation 18404.1(a)(1) might not be specific enough to identify the specific committees being targeted for termination.

Commissioner Knox questioned what date would be used to identify when a committee had debts.

Chairman Getman suggested that the language "as of the effective date of this regulation" be added after the word "debts" in regulation 18404.1(a)(1) and (a)(2).

In response to a question, Chairman Getman explained that "net debts outstanding" is defined in other provisions of Proposition 34 and would not need further clarification in the regulation because other regulations define when net debt is calculated.

Ms. Armstrong explained that committees are being notified of the changes.

Ms. Wardlow added that two staff people are working on gathering information, building a data file, and drafting letters so that candidates can be notified.

Ms. Armstrong stated that they are prepared to begin the notification process as soon as the regulation is adopted. She noted that the comment letter from Congressman Sherman requested an automatic 6-month extension under certain circumstances.

Commissioner Downey stated that subdivision (f) should address Congressman Sherman's concerns.

Ms. Armstrong noted that one of the criteria Congressman Sherman suggested cannot be required under the SEIU case. The Commission cannot prohibit transfers between candidates.

Chairman Getman moved that regulation 18404.1 be adopted with the two changes adding the effective date of the regulation.

Commissioner Swanson seconded the motion.

Commissioner Downey suggested that the word "contributor" on page 2, line 21, be changed to "contributors."

Ms. Armstrong agreed.

Commissioners Downey, Swanson, Knox and Chairman Getman voted "aye." The motion carried by a vote of 4-0.

Chairman Getman moved repeal of emergency regulation 18404.2.

Commissioner Downey seconded the motion.

There being no objection, the motion carried.

Item #5. Proposition 34 Regulations: Repeal of Emergency Regulation 18543; Adoption of Regulation 18543 Concerning Lifting of Voluntary Expenditure Limits.

Ms. Menchaca explained that the proposed regulation is identical to the emergency regulation the Commission adopted. Staff has not received any comments from the public regarding the regulation. She recommended that the Commission repeal the emergency regulation and adopt the proposed regulation on a permanent basis.

Commissioner Swanson moved repeal of emergency regulation 18543 and adoption of regulation 18543.

Commissioner Knox seconded the motion.

Commissioners Downey, Swanson, Knox and Chairman Getman voted "aye." The motion carried by a vote of 4-0.

Item #6. Proposition 34 Regulations: Personal Loans (§ 85307) – Adoption of Regulation 18530.8.

Ms. Armstrong presented this regulation, noting that two decisions remain to be made. The first is whether the definition of "campaign" should be limited to the candidate's controlled committee, or whether it should include all committees formed for the purpose of supporting the candidate for elective state office. The second issue is whether a loan to a candidate from a commercial lending institution, for which the candidate is personally liable, which a candidate then loans to his or her campaign, would count toward the $100,000 limit under § 85307.

Ms. Armstrong explained that proposed regulation 18530.8(b) has been rewritten to conform with the Commission's previous decisions.

Chairman Getman suggested that line 11 of proposed regulation 18530.8 be changed to read, "committees formed for the purpose of supporting the candidate's candidacy for that".

In response to a question, Ms. Armstrong explained that there have been several questions from the public regarding subdivision (c). She reported that further review of the third option presented by Mr. Nottelson, from Franchise Tax Board, revealed it would have been a restatement of option a.

In response to a question, Ms. Menchaca stated that, prior to Proposition 34, when a candidate obtained a bank loan and contributed the money to his or her campaign, it was considered a contribution. She did not believe that Proposition 34 changed that.

In response to a question, Ms. Wardlow stated that there would be no limit on the amount of money a candidate could contribute to his or her own campaign when the source of the money is a personal loan to the candidate from a bank.

Ms. Menchaca noted that § 85301 specifically provides for that.

Ms. Wardlow explained that Technical Assistance Division has been asked whether, under other provisions of the Act, a committee could make a refund of a contribution to the candidate.

In response to a question, Ms. Armstrong stated that the Commission was being asked to determine whether the contribution would be subject to limits if the candidate loaned it to the committee instead of donating it.

In response to a question, Ms. Wardlow stated that the loan to the committee would be considered a contribution, but it would be from the candidate, not from the lending institution. The candidate would report it as received from the bank. Under current rules, the bank would be the lender. The candidate would pay the interest on the loan.

Chairman Getman noted that the committee is precluded from paying interest on a loan from a candidate.

In response to a question, Ms. Wardlow stated that the current forms require that the bank be shown as the lender on the loan schedule. The candidates have not been required to be listed as the guarantor of the loan in the past because it has been assumed that, if a bank is shown on the campaign statement as the lender, the candidate is guaranteeing the loan. If anyone else guaranteed the loan, the candidate would have to list the names of those guarantors.

In response to a question, Ms. Wardlow stated that it is quite common for candidates to obtain bank loans for the campaign.

Commissioner Knox asked if the issue facing the Commission was whether a candidate would be allowed to borrow $200,000 from a bank and loan it all to his campaign committee under § 85307(a).

Ms. Armstrong responded that it was, and noted that if it is not allowed, § 85307(a) would not be considered an exception to the statute but could be read as meaning that it would be subject to

the contribution limits of § 85301 because a loan is considered a contribution. She acknowledged that under § 85301(d) there are no limits to what a candidate can contribute.

Chairman Getman stated that an absurd situation seems to exist, whereby a candidate can loan his or her campaign up to $100,000 of the candidate's personal money, but if that money is borrowed from a bank, the amount that the candidate borrows then loans to his or her committee would be unlimited. If a candidate contributes borrowed money to a campaign, the amount of that contribution would be unlimited.

Ms. Menchaca stated that the only way to read it differently would be to construe the language "may not personally loan," in § 85307(b), as meaning that the loan is a second transaction and, as such, is considered a personal loan from the candidate because the candidate has taken that money borrowed from the bank, without any kind of political consideration, and converted it to his or her own personal funds.

Commissioner Knox stated that it leaves subdivision (a) without meaning.

Chairman Getman suggested that it could be argued that otherwise the candidate exceeds (b) by taking the loan from the commercial lending institution.

Commissioner Knox noted that there is no limit to how much a candidate can borrow during a campaign from a commercial lending institution to spend on houses, cars, etc.

Chairman Getman suggested that the language in (a) could support that because it put some limits on candidate loans used for political purposes.

Ms. Menchaca stated that she thought that the primary reason for including the language of § 85307(a) was to make sure that banks were not subject to the $3,000 contribution limit when they make personal loans with no political consideration. It does, however, require that the provisions of the Article with regard to loans be linked in to the contribution limit sections of the Act.

Chairman Getman suggested that this may be a regulation that will need legislation to fix.

In response to a question, Ms. Armstrong stated that, according to the ballot pamphlet, the $100,000 limit on candidate loans to the candidate's campaign was intended to prevent the wealthy candidates from lending a lot of money to their campaign and getting special interests to pay off their debt through large contributions.

Chairman Getman stated that it was intended to require that wealthy candidates contribute money to their campaign rather than loan money. This seemed to be the only constitutional way of limiting the financing by wealthy candidates to their own campaigns.

Ms. Armstrong pointed out that there was nothing in the ballot pamphlet that directly addresses the issue of the bank loans.

Commissioner Knox noted that this can help the cash-poor candidate who can get a loan for their campaign.

Chairman Getman moved that proposed regulation 18530.8 be adopted with the addition of the word "that" on line 11 and with the phrase, "do not" on line 17.

Commissioner Knox seconded the motion.

Commissioners Downey, Swanson, Knox and Chairman Getman voted "aye." The motion carried by a vote of 4-0.

Item #9. Campaign Disclosure Forms—Form 460 Instructions; Ratification of Fact Sheet 34-01, Volume 2.

Chairman Getman explained that the proposed Fact Sheet was the second in the FPPC's series of fact sheets explaining Proposition 34.

Commissioner Swanson stated that the fact sheet was very useful and very well done. She moved that the fact sheet be approved.

Commissioner Knox seconded the motion.

There being no objection, the motion carried.

Item #13, #14, and #15.

Commissioner Swanson moved that the following items be approved on the consent calendar:

Item #13. ***In the Matter of Save the Horses and Cathleen Doyle, FPPC No. 00/666.*** (10 counts.)
Item #14. ***In the Matter of Roni Capital, LLC, FPPC No. 01/249.*** (1 count.)
Item #15. ***In the Matter of Leonard Robinson, FPPC No. 01/465.*** (1 count.)

There being no objection, the items were approved.

Item #20. ***In the Matter of David P. Garofalo and Committee to Elect Dave Garofalo, FPPC No. 98/384.*** (24 counts.)

Chairman Getman explained that this item was added to the agenda with 48 hours notice to the public in accordance with the provisions of the Bagley-Keene Act.

Ms. Bigelow summarized the facts of this case which involved failure to disclose sources of income, failure to disclose gifts as sources of income, accepting gifts that exceeded the gift limit, campaign reporting violations, and violation of the conflict of interest code.

Ms. Bigelow explained that staff worked extensively in a joint effort with Orange County District Attorney's office to prosecute the conflict of interest violations criminally. On January 10, 2002 Mr. Garofalo pled guilty to one count of violating Government Code 1090 as a felony by participating in a contract in which he had a financial interest. He also pled guilty to 15 misdemeanor counts of violating the Political Reform Act and was placed on felony probation for three years and was required to perform community service. Mr. Garofalo could serve three years in state prison if he violates the law or conditions of his probation. Additionally, he was required to resign his position as a City Council Member. As a convicted felon, Mr. Garofalo will not be allowed to run for office again.

Ms. Bigelow stated that Mr. Garofalo, as part of the negotiated resolution, admitted to the 24 counts contained in the stipulation presented to the Commission, for a total fine of $47,000. The District Attorney assured FPPC staff that the proposed payment plan comports with the respondent's ability to pay, after conducting an extensive audit of Mr. Garofalo's financial records. She explained that the respondent had executed a "confession of judgement," which allows staff to more easily obtain a judgement against Mr. Garofalo should he fail to meet the payment obligations.

Ms. Bigelow recommended that the Commission adopt the proposed stipulation.

Commissioner Swanson moved that the stipulation be adopted.

Chairman Getman congratulated staff.

In response to a question, Ms. Bigelow explained that Mr. Garofalo could not afford to pay the fine up front, and therefore the payment plan was required. Staff could have pursued taking a default, which would have required that staff try to get some money from him each month through wage garnishment, but believed that the payment plan was a better alternative.

Mr. Russo explained that the settlement allowed for a final joint resolution of the case. The case was an example of how the FPPC and local prosecutors can work together on common targets of investigation and on common cases.

In response to a question, Ms. Bigelow explained that the matter was opened as a result of a complaint received by staff.

Commissioner Knox seconded the motion.

Commissioners Downey, Swanson, Knox and Chairman Getman voted "aye." The motion carried by a vote of 4-0.

The Commission adjourned for a short break at 3:35 p.m.

The Commission reconvened at 3:50.

Item #10. Overview of Conflict of Interest Disclosure Provisions of the Political Reform Act.

Ms. Wardlow presented an overview of the Commission's duties and current policies with regard to conflict of interest codes. She explained that the two types of officials covered under the Act's disclosure provisions are (1) officials that are listed in Government Code section 87200, and (2) those who file pursuant to a conflict of interest code under § 87300.

Ms. Wardlow explained the provisions of § 87200, which specifies those state and local officials who have the broadest decision-making authority and imposes on them the broadest disclosure requirements. She also explained the provisions of § 87300, which requires every state and local agency to adopt a conflict of interest code and to identify in the code those officials and employees whose duties involve the making of governmental decisions. She discussed those disclosures, explaining that they must be tailored to the types of decisions that those designated officials and employees make.

Ms. Wardlow stated that most local conflict of interest codes are not subject to review by the Commission, in accordance with § 87301, but are promulgated and reviewed at the local level. She provided examples. The Commission adopted a model conflict of interest code in 1980, which is now used by most agencies as their conflict of interest code, which streamlines the process for the agencies and for the FPPC.

Ms. Wardlow explained that the Commission is the code reviewing body for all state agencies and for agencies that have jurisdiction in more than one county. She explained the process for those reviews, noting that the Commission delegated consideration and adoption of codes to the FPPC Executive Director.

In the past year, Ms. Wardlow reported, issues about consultants have arisen. Many consultants are subject to disclosure under the Act. In 1980 the Commission developed a "generic" consultant disclosure category as part of its own conflict of interest code, which has since been used as a model for other conflict of interest codes.

Ms. Wardlow stated that the Commission serves as the filing officer for Statements of Economic Interest filed by approximately 15,000 state and local officials, and discussed who those officials are and when they have to file. Other statements are filed with an employee's agency. Those agencies perform the same duties that the FPPC performs for the statements that the FPPC receives, and Ms. Wardlow explained those duties. She noted that filing officers can impose late filing penalties of up to $100.00, and are required to report violations of the Act to an appropriate enforcement official.

Ms. Wardlow presented a sample of a data file on the FPPC database and showed the Commission how information is logged. She noted that the FPPC database is continuously updated as filers enter and leave the system. Additionally, staff contacts filing officers annually to update their information. She explained how statements are reviewed, noting that § 18115 requires that at least 20% of all statements have to be reviewed in detail.

During 2001, Ms. Wardlow reported, staff requested 1,300 amendments, and assessed approximately $19,000 in late filing penalties. They referred 121 non-filers to the Enforcement Division, over half of which were for failing to file leaving office statements.

Ms. Wardlow explained that an intermediary local filing official receives and forwards all statements received by the Commission, and that staff works closely with local officials as a result of this. The Commission created the filing officer outreach program in 1999, allowing Technical Assistance Division staff to meet with filing officers and provide detailed training and review. Staff also conducts workshops on how to complete the statements of economic interest and how to adopt or amend a conflict of interest code.

Ms. Wardlow explained that several issues were identified in 2001, as outlined in her memo.

In response to a question, Ms. Wardlow explained the details that staff examine during reviews, explaining that all schedules are studied to ensure that there are no omissions or inconsistencies. Prior year statements are checked for elected state officers and higher level state agency officials because those are the most requested and subject to the most scrutiny. Staff does not review the forms before they are filed, but provide help completing the forms when asked.

In response to a question, Ms. Wardlow stated that complaints can be filed with the Commission or the local enforcement official. Agencies submit biennial notices to their code reviewing body. She responded that the online Form 700 privacy concerns could be addressed by giving the officials the option of filing online. She pointed out that paper filings are public documents, but public officials are nervous about having the information available on the internet.

Chairman Getman stated that staff has been exploring this issue by discussing it with other states and at the federal level, and that some states have online filing, but access to the database is limited and the database is not available over the internet. Before the Commission would put these online it would be necessary to have public input on the issues.

In response to a question, Ms. Wardlow stated that, if the FPPC had the resources, staff could provide more review of local conflict of interest codes. Additionally, the Commission might consider becoming the code reviewing body for all conflict of interest codes.

Prasanna Rasiah, Deputy City Attorney for the city of Berkeley stated that the Commission issued the *In re Siegal* opinion in 1977, and that the opinion has provided that members of nonprofit organizations and their staff have been considered public officials. The League of California Cities, City Attorney's Department, is proposing a regulation that would supercede the *Siegel* opinion, and would focus on control over the private nonprofit corporation by a local government agency.

Mr. Rasiah explained how *Siegel* defined local government agencies and private nonprofit agencies, and reviewed the four criteria established for those definitions in the opinion. The result of the application has been to include a number of community nonprofit organizations and its members as public officials, subject to the disclosure requirements of the Act.

Mr. Rasiah stated that the League of California Cities and the city of Berkeley did not believe that the Act intended to treat private nonprofit organizations as local government agencies. The intent of the Act was to address campaign abuses.

Mr. Rasiah urged the Commission to sponsor an Interested Persons meeting to discuss the merits of a proposed regulation to address these issues, and would focus on the control over the organization and its actual decisions. He enumerated some concerns that could be addressed. He noted that staff work was done on the issue in 1998.

Chairman Getman explained that the Commission has a regulatory calendar and urged Mr. Rasiah to work with staff to see whether it can be included in the calendar.

In response to a question, Mr. Rasiah stated that a nonprofit corporation that addressed energy conservation from the City of Berkeley was recently advised that, if they broke away from the city, they would still be considered a local government agency subject to the provisions of the Act. He noted that the local government is on the front line in enforcing the rules and that it is difficult for them to explain why nonprofit officials are considered public officials.

Item #7. Proposition 34 Regulations: Discussion of Section 85312: Payments for Member Communications.

Staff Counsel Natalie Bocanegra explained that section 85312 was an exception providing that payments for communications supporting or opposing a candidate or ballot measure are not contributions or expenditures. This section could be applied for committee formation, particularly in identifying which payments are contributions or expenditures that count toward qualification of the committee. It could also be applied for disclosure purposes, identifying contributions or expenditures that are to be reported by a committee. Lastly, it could also be used to identify a contribution that is subject to the Act's limits.

Ms. Bocanegra explained that the plain meaning of the statute controls when the language is clear. However, staff believed that there was a latent ambiguity in the statute, since the text does not identify who makes the payments described in the section. Additionally, a patent ambiguity existed in the statute, because the Commission will have to define a number of terms in construing the section. Because these definitions are needed, an ambiguity exists.

Ms. Bocanegra reviewed the approaches suggested in the staff memo. In the first approach, which is more broad, the language of the statute is applied to all persons and would relieve all existing committees from disclosure obligations that are relative to member communications. This would be a change from Commission policy whereby payments made by an organization, formed or existing primarily for political purposes, are expenditures which must be reported. This approach would probably require amendment of current reporting regulations.

In response to a question, Ms. Bocanegra stated that, hypothetically, under the broad approach, there could be the "members" of a political committee supporting a particular candidate.

Chairman Getman stated that the statute could be read to mean that a committee can make payments for communications to anyone who is a member, employee, shareholder, etc., of not just its organization, but any organization under the broadest interpretation, and not report the payment. A narrower interpretation would allow payments from a committee to that committee's members.

Ms. Bocanegra noted the difficulty presented because the discussion did not begin with any defined terms. The issue presented concerned the definitions of "member" and "organization," and those terms are not yet defined.

Ms. Menchaca added that a qualifying recipient committee is considered to have made a payment for political purposes whenever it makes a payment and that would be reported. If the committee sends out 30,000 flyers, there would be disclosure of the payments funding that flyer. Under a very broad approach, that disclosure might no longer be required to be reported if those communications were sent to members, depending on how the Commission defines "members."

Commissioner Knox stated that any sensible distinction to communications to the general public would provide that the communication must be to an organization's own members, employees or shareholders.

Commissioner Downey stated that the statute is subject to a literal interpretation that would exempt, for reporting purposes, communications to members, employees, and shareholders of an organization.

Ms. Menchaca pointed out that the definitional issues may need to be narrow or broad, and the approach the Commission chooses will help guide those definitions.

Ms. Bocanegra stated that staff believes that the issue is how to apply the statute to existing committees. Staff considered committees established under § 82013, and the effect on those committees and their reporting obligations.

Ms. Bocanegra stated that there were two different ways of narrowly construing § 85312. The first approach excludes all existing committees from the scope of this section, except those committees associated with political parties expressly addressed in the statute. Under this exclusion approach, only non-committee organizations would not count the payments they are making for member communications as contributions or expenditures. This option would provide increased disclosure, and would constitute a reversal of Commission policy for some committees if the section were viewed as superceding the newsletter exception. This will occur if the approach is premised on the principle that § 85312 is meant to enhance disclosure; that the newsletter exception went too far; that § 85312 applies only to non-committees; and that the section supercedes the newsletter exception. This would be the most narrow construction of § 85312.

Ms. Menchaca explained that the first two approaches represent two extreme options. The broad option provides no reporting, and the exclusion approach would require reporting by committees who previously did not have to report.

Ms. Bocanegra explained the newsletter exception approach, which would apply § 85312 to different types of communications in the same manner as the newsletter exception.

Chairman Getman explained that a labor union currently can take a position on a candidate or committee in its newsletter and would not become a political committee for doing so.

Ms. Bocanegra explained that the newsletter approach expands the newsletter exception in terms of the types of communications it applies to, and also expands its application to communications to families of members, shareholders and employees. This approach would result in the least change to existing law from the other approaches but would result in some reduced reporting.

Ms. Bocanegra explained that the Commission may wish to pursue legislative clarification of the statute, focusing on identification of the persons making payments for communications and whether the statute was meant to alter longstanding committee formation and disclosure rules. Staff did not recommend the broad approach.

Ms. Menchaca noted that, if the Commission chose the newsletter approach, staff may focus on clarifying on what is meant by "organization." The emphasis would be on communications and defining what is not exempt.

In response to a question, Ms. Menchaca stated that under the proposed newsletter approach, communications to a committee's own members would not be required to be reported. However, reporting would be required on the basis of currentCommission advice. Staff currently has some advice that applies to non-committees, and other advice stemming from Commission direction, but it is not codified. This would clarify those rules.

Staff Counsel Larry Woodlock explained that the current newsletter exception required recipient committees to report their expenditures for member communications and the newsletter approach would not change that. The other narrow exception option would require that recipient committees continue to report their member communications, but independent expenditure and major donor committees would also have to make those reports, which they have not had to do in the past.

In response to a question, Ms. Menchaca explained that the three committees could communicate to their own members without reporting under the broad approach.

Commissioner Knox suggested that, even under the broad approach, the definition of "member" should indicate that they wish to be a member.

Chairman Getman pointed out that some recipient committees are also membership organizations.

Commissioner Knox stated that it would be appropriate for those committees to be covered under § 85312 even though they are recipient committees, and may be exactly the exception contemplated by the statute.

Mr. Woodlock explained that, if some interpretation of the statute is necessary, then there is not a "plain meaning" to the statute. Statutory construction must then be addressed, such as the purposes of the Act and the consistency of the interpretation with other provisions of the Act. Those principles of statutory construction have led more closely to the newsletter approach because it changes current law to the least degree.

Commissioner Knox stated that, if the terms "member" or "organization" must be interpreted, they should be interpreted in a manner that provides a reasonable construction, and there must be some reason to exclude from "organization" the three types of committees identified in staff's memo.

Mr. Woodlock agreed. Staff believed that leaving all three committees in their current status was the most consistent with the language and purpose of the statute.

Ms. Menchaca added that the regulations deal with organizations that exist as an entity, such as nonprofits or labor unions. Those organizations establish political action committees (PACs) and engage in political activity through those committees. If "organization" were defined to embody the two separate entities, the PAC would be outside the scope of the statute. This is important because organizations that are not PACs would make payments through their organizational funds and may not be required to disclose the information. However, if the PAC is used to make the payments, they should disclose the payments because they are under the purview of the Act.

In response to a question, Ms. Menchaca stated that recipient committees are required to report expenditures for newsletters.

Commissioner Knox stated that the definition of "member," and whether PACs have members, is the main issue.

Commissioner Downey agreed, noting that the question is also whether the payers would be limited, under § 85312, to those organizations that have the different classifications.

Commissioner Knox stated that the PAC and the labor union would be organizations. The labor union could communicate to its own members without reporting expenditures under § 85312. The question is whether the PAC for the labor union could send out a communication to those same members without reporting the expenditures. He believed that they should be reported unless the recipients have indicated that they want to be members of the PAC.

Chairman Getman presented an example of an organization that is funded by required union member contributions, and that organization funds its PAC. She questioned how the union members could not be considered members of the PAC.

Commissioner Knox stated that union members should indicate in some way that they want to be members of the PAC. Otherwise, bogus organizations could be put together.

Commissioner Downey stated that there appeared to be a consensus that the payers are the organizations that have members, employees, shareholders etc.

Chairman Getman stated that the Commission appears to be rejecting all of the proposed approaches, and was suggesting an approach similar to the newsletter approach but requiring that "organization" be defined.

Commissioner Downey stated that committees may not be considered to be an organization when "member" is defined.

Commissioner Knox stated that a PAC sending a communication to its own employees should be covered under § 85312, therefore it would seem to be an organization.

In response to a question, Commissioner Knox stated that the term "organization" should get a fairly broad construction, but that "member" should be more narrowly defined.

Mr. Woodlock responded that staff would use the newsletter approach but with important qualifications.

Ms. Bocanegra explained the earmarking issues addressed in decisions 6 and 7. Staff recommended that "political party" be defined to mean "political party committee." She noted enforcement issues with regard to record-keeping (under decision 4) and explained that slate mailers (under decision 5) would be included in the definition of "communication".

Ms. Bocanegra explained that a person who wished to make a contribution to a candidate in excess of the contribution limits could possibly make a payment to an organization who would use those monies to communicate to members in support of the candidate. She asked whether the Commission wanted staff to further explore this earmarking issue.

Ms. Menchaca noted that decisions 6 and 7 also focus on §§ 85303 and 85310. She noted that the public believes that §§ 85310 and 85312 work to exempt many communications from the electronic filing requirement of $50,000 communications. Staff believed that three regulations may be needed for the three issues.

Chairman Getman noted that there is a $25,000 limit on contributions to a political party, as opposed to a $3,000 limit to a candidate. One issue is whether a person could make a $25,000 contribution to the political party and asked that it be earmarked for member communications in support of a political candidate, thus avoiding the contribution limit.

In response to a question, Mr. Woodlock responded that a similar contribution to a union would present the same issues.

Ms. Bocanegra noted that, under § 85303(b), there is a specific provision that arguably applies a $25,000 contribution limit. Both situations involve earmarking issues that need to be addressed.

Item 17 and 18.

The Commission took the following items under submission.

Item #17. Executive Director's Report.

Item #18. Litigation Report.

Item #16. Legislative Report.

Executive Fellow Scott Burritt explained that staff proposed consideration of a legislative amendment that would ensure that the Commission and the Franchise Tax Board have the statutory authority to conduct audits. Staff proposed amendment of Government Code section 90000(a) and 90003 by including Chapters 4.6 and 5 of the PRA. Without the statutory authority, audits could not be conducted under Chapter 5. There was no opposition to this proposal.

There was no objection from the Commission to pursuing the legislative amendment.

Mr. Burritt explained that staff proposed another legislative amendment eliminating the requirement that individuals disclose loans from government entities and commercial lending institutions on their Statements of Economic Interest (SEI). Currently, loans from these sources with balances over $10,000 are reportable on Form 700. The loans do not create a financial interest on the part of public officials, and do not disqualify them from making governmental decisions.

In response to a question, Mr. Krausse stated that it would be better to do this after the conflict of interest and SEI process review, but that a spot bill could contain this provision, and additional items identified after the review could be added to the bill at that time.

Chairman Getman supported the change, but noted that additional changes sometime confuse the public.

Mr. Krausse responded that the changes could all be made in one bill by starting the process and adding changes as they are identified.

There was no objection to amending the bill.

Mr. Burritt explained that staff proposed eliminating the requirement that state candidates and committees, which file campaign statements electronically with the Secretary of State, also file paper copies with their local filing officers. Government code sections 84215 and 81008(b) would need to be amended. This would provide a cost savings to local filing officers, candidates and committees. Staff did not propose eliminating the paper copies filed with the SOS, but this would be a first step towards eliminating duplicate reporting requirements.

Mr. Burritt stated that it is a convenience to the public to have the documents at the local level, and that those documents would provide a backup to the documents filed with the SOS.

Mr. Krausse explained that Enforcement staff was concerned about eliminating the backup documents. He pointed out that, eventually, paper filings will be eliminated. He noted that it is difficult to identify whose error caused a campaign statement to not be filed with the SOS, and consequently no charges are filed.

Chairman Getman noted that SOS staff is putting much of its resources into the online filing system. As a result, processing the paper filings may not be as timely. She did not believe that it would be advisable to give up the paper filings kept at the local level at this time.

Mr. Krausse responded that the SOS was considering sponsoring similar legislation. If the Commission chose to do nothing, they might see the same type of bill which they may wish to support or oppose.

The Commission chose not to pursue legislation eliminating the requirement to file campaign statements with local filing offices.

The meeting adjourned at 5:30 p.m.

Dated: December 7, 2001

Respectfully submitted,

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Sandra A. Johnson
Executive Secretary

Approved by:

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Chairman Getman